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January 24, 2005

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Room TW-B204  
Washington, DC 20554

Re: *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced  
Prepaid Card Services*, WC Docket No. 03-133

Dear Ms. Dortch:

In this proceeding, AT&T attempts to avoid its legal obligations to pay its fair share to the Universal Service Fund ("USF") and proper charges to local exchange carriers for access to their networks. As explained in AT&T's most recent *ex parte*,<sup>1</sup> AT&T asserts that it can unilaterally convert a telecommunications service into an information service merely by labeling it as such in its Cost Allocation Manual ("CAM") and by putting an advertisement in the call set-up segment of a regularly dialed telephone call made with a prepaid calling card. BellSouth respectfully disagrees with both of these assertions.

AT&T takes the filing of a CAM to new and dizzying heights, insisting that a CAM filing in 1994 "proves" that its prepaid calling card is an information service and insulates it from ever being questioned about the validity of this regulatory classification. If BellSouth understands AT&T's argument correctly, AT&T believes that its 1994 CAM filing put the FCC and all the world on notice that it provided some prepaid cards as information services, even though it continued to provide "other" prepaid cards as a tariffed telecommunications service, and if any party or the Commission disagreed with

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<sup>1</sup> *Ex Parte* letter from Judy Sello, Senior Attorney, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket No. 03-133 (Jan. 14, 2005) ("*AT&T Ex Parte*").

this classification they had to speak then or forever hold their peace. This argument is misguided.

First, a CAM filing does not limit the Commission's authority over a service or prevent the Commission from classifying a service correctly after the CAM has been filed. The only limitation of which BellSouth is aware that restricts the Commission's authority over a matter such as this is the statute of limitations section of the Communications Act of 1934, which relates to matters being time barred from the Commission's review. Here, of course, AT&T has affirmatively sought Commission review of its prepaid calling card service by initiating this proceeding. Second, a CAM filing does not determine whether a service is a telecommunications or information service. Whether or not an offering qualifies as an information service is determined by the facts and the law, and they are not malleable to a CAM filing. AT&T cannot be protected from the consequences of improperly classifying a service simply by unilaterally filing a CAM.<sup>2</sup>

AT&T's own actions belie any suggestion that its 1994 CAM filing "proves" that its prepaid calling cards constituted an information service. This is clear from the fact that AT&T did not stop paying access charges or cease contributing to the universal service fund with respect to prepaid calling card calls until years after its 1994 CAM filing had been made. As AT&T has acknowledged, it continued to contribute to the universal fund with respect to prepaid calling card calls until early 1999 and did not stop paying access charges on prepaid calling card calls until mid to late 2002.<sup>3</sup> Thus,

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<sup>2</sup> The Commission's *Inmate Calling Services Declaratory Ruling* vividly illustrates the fallacy of AT&T's approach to the CAM. See *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, RM-8181, *Declaratory Ruling*, 11 FCC Rcd 7362 (1996) ("*Inmate Calling Services Declaratory Ruling*"). In that case, the petitioners filed a request that the Commission declare that certain specialized services provided on inmate-only payphones are enhanced services that must be provided on an unregulated basis. In considering this request, the Commission applied the facts and the law, determining that the services in question did not meet the definition of an enhanced service. Importantly, one fact that the Commission did not consider was whether carriers had classified such services in their CAM as information or enhanced services. Furthermore, nothing in the Commission's decision suggests that the Commission would be required to find that such services were enhanced simply by virtue of the fact that they had been classified as such in a CAM filing.

<sup>3</sup> See AT&T Form 10-Q for period ending Sept. 30, 2004 at 16 (filed Nov. 4, 2004) (noting "that the current classification of AT&T's enhanced prepaid card service has generated approximately \$340 million in access savings *since the third quarter of 2002*, and approximately \$160 million in USF contribution savings *since the beginning of 1999*, compared with the cost that would have been incurred by a basic prepaid card offering.") (emphasis added); see also Legg Mason Telecom Regulation, "FCC Disputes AT&T Calling Card Bid, But Labors Over Course, Consequences," (Jan. 19, 2005)

AT&T's 1994 CAM filing establishes nothing concerning the appropriate regulatory classification of its prepaid calling card service and hardly explains why AT&T waited almost a decade before affirmatively bringing this matter to the attention of the Commission and the industry.<sup>4</sup>

Furthermore, no dispute exists that AT&T continued to file tariffs for prepaid calling cards as a regulated service at least until 1998. Although AT&T insists that these tariffs relate to its traditional prepaid card business while the CAM filing related to its enhanced services prepaid cards, this claim only proves the illogicality of AT&T's position. For example, assume AT&T sold both its self-termed traditional and enhanced services prepaid cards to the same retailer, which subsequently sold the cards to two customers who walked into the same store at the same time to purchase a prepaid card from AT&T in order to make a telephone call. One of the customers happens to pick up AT&T's traditional card while the other happens to pick up AT&T's so-called enhanced services card. Each customer performs the same 8XX dialing to reach a prepaid platform in order to call a friend that lives in the same town within the same state from which the customers are calling. The only difference in the entire process would be that one customer would hear some form of advertisement when he or she reached the prepaid platform while the other customer would not. Yet, under AT&T's theory the customer that happened to hear the advertisement purchased and used an information service to make an interstate call while the other used a telecommunications service to make an intrastate call. Such an outcome absolutely makes no sense.

Whether or not a service is an information service depends on what is offered to end users.<sup>5</sup> Thus, Pulver's Free World Dial-up is an information service because it "makes available to its members information that enables them" to engage in and control a number of communications functions. Here, AT&T offers pre-paid calling cards to the

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("AT&T has sold prepaid calling cards for a long time, but it says it didn't migrate large volumes of calls to its 'enhanced' service until 1999, five years after its introduction").

<sup>4</sup> General Communications, Inc. ("GCI") has offered a credible explanation for this delay, noting that AT&T filed its petition with the Commission 24 hours before AT&T was required to respond to a request from the Regulatory Commission of Alaska ("RCA") for verification "that AT&T had appropriately paid regulatory cost charges for the intrastate share of revenues associated with prepaid cards in Alaska," after which AT&T used the filing to challenge the RCA's jurisdiction. *See Ex Parte* Letter from Lisa R. Youngers, Counsel for GCI, to Marlene Dortch, Secretary, FCC, at 3, n.6 (Jan. 10, 2005).

<sup>5</sup> *See* Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, 19 FCC Rcd 3307, ¶ 11 (2004); *Commission's Universal Service Report* at 79 ("The service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities").

public. Those cards do not give users access to “a variety of advanced capabilities” or provide information that enables them to engage in communications functions. The cards provide a basic telecommunications service into which AT&T has inserted an advertisement. The advertisement or other similar message has no communications function. It is no different than the commonplace “thank you for using X Company” information that calling platforms have long added to long distance calling card calls. AT&T cannot be said to “offer” or “provide” an information service within the meaning of the Commission’s rules by unilaterally inserting an advertisement into the call set-up segment when the customer does not even know about this “functionality” (and likely does not even want it) and when it offers no communications functions.<sup>6</sup> The requirement that an enhanced service must provide the customer with some capability that is offered to the customer and that the customer agrees to purchase prevents a carrier from doing what AT&T is attempting to do here -- artificially characterize a telecommunications service as enhanced without providing some meaningful additional functionality to the consumer of which the customer is reasonably aware.<sup>7</sup>

Although AT&T argues that no requirement exists to “demonstrate customer motivation regarding, desire for, or even use of the additional information (or other enhancements) provided to the subscriber ...,” this argument misses the mark. As AT&T acknowledges, the question of whether a service constitutes a single offering (and, in turn, whether that service qualifies as an information or telecommunications service) is determined “from the end user’s standpoint.”<sup>8</sup> It would be impossible to make this determination if the end user is not even aware of the “functionality” being offered.

Moreover, the Commission has repeatedly “reaffirmed that the enhanced services definition applies only to end-to-end communications between or among subscribers. Thus, communications between a subscriber and the network itself (e.g., for call set up, call routing, and call cessation) are not considered enhanced services.”<sup>9</sup> This principle is

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<sup>6</sup> See 47 C.F.R. § 64.702(a).

<sup>7</sup> AT&T’s attempt to analogize its prepaid calling cards to a cable modem is unpersuasive. See *AT&T Ex Parte*, at 2. Unlike a calling card, a cable modem provides the customer with “a variety of advanced capabilities” as well as a host of communications functions. While a cable modem may allow a customer to take advantage of capabilities that are “tangential” to the “primary” purpose of the service, “such as functions that allow subscribers to create their own websites,” customers reasonably are or should be aware of such capabilities, particularly since they may factor into the purchasing decision. The same cannot be said about AT&T’s advertisement “functionality.” Indeed, customers would likely be reluctant to purchase an AT&T prepaid calling card if they knew they must suffer through an advertisement in order to use it.

<sup>8</sup> *AT&T Ex Parte* at 2 (quoting the Commission’s Report to Congress ¶ 58).

<sup>9</sup> *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service is a Basic Service*;

fatal to AT&T's argument, since the advertisement "functionality" trumpeted by AT&T is nothing more than a communication between a subscriber and the network database in which the advertisement is stored.<sup>10</sup> Indeed, in the notice proposing the rule defining an enhanced service, the Commission observed that this clause of the definition – to provide "additional, different, or restructured information" -- was intended to "subsume services related to process control functions – such as fire and intrusion detection and alarm systems."<sup>11</sup> Obviously, there is no "process control function" associated with an advertisement. If it were otherwise, every telephone call magically could be transformed into an information service simply by the carrier inserting a message thanking the customer for using that carrier's service.

The Commission should not be confused by AT&T's attempts to equate its prepaid calling card service with VoIP or swayed by AT&T's predictions about dire consequences for "recent immigrants, military personnel and many low-income consumers," for whom, AT&T claims, prepaid cards "are their *only* way to make telephone calls."<sup>12</sup>

First, AT&T's marketing ploy to insert an advertisement into the set up of a prepaid calling card call hardly constitutes "a lifestyle-changing, new fantastic technology," as is the case with VoIP.<sup>13</sup> To the extent VoIP providers are offering prepaid calling card services, such services should be analyzed on a case-by-case basis, consistent with the Commission's general approach to VoIP, rather than in the broad, one-size-fits-all manner advocated by AT&T. Of course, and notwithstanding AT&T's suggestions to the contrary, the inter-carrier compensation regime applicable to VoIP

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*and American Telephone and Telegraph Company Petition for Declaratory Ruling That All IXC's Be Subject to the Commission's Decision on the IDCMA Petition, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719, ¶ 14 (1995) (citing Computer III Phase II Order, 2 FCC Rcd 3072 (1987)) (footnotes omitted).*

<sup>10</sup> See, e.g., *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, RM-8181, *Declaratory Ruling*, 11 FCC Rcd 7362 (1996) ("*Inmate Calling Services Declaratory Ruling*") (call blocking and screening functions drawing upon stored information held insufficient to qualify pay telephones for inmates only as an enhanced service).

<sup>11</sup> *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizing Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, *Supplemental Notice of Proposed Rulemaking*, 1986 FCC LEXIS 3236 at \*31, ¶ 33 (1986).

<sup>12</sup> *AT&T Ex Parte*, at 8 (emphasis in original).

<sup>13</sup> See *Kudlow & Kramer: Interview of Chairman Michael K. Powell* (CNBC Television, Nov. 19, 2003).

Ms. Marlene H. Dortch

January 24, 2005

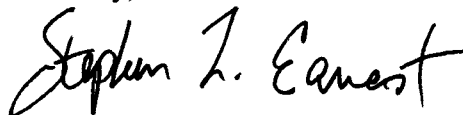
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remains pending before the Commission, and nothing in this case impacts the Commission's resolution of such issues.

Second, AT&T's claim that it would be "arbitrary and inequitable" for the Commission to enforce well-established rules concerning the payment of intrastate access charges because prepaid calling cards "are disproportionately purchased by low-income, minority, and other protected groups" would turn the entire inter-carrier compensation regime on its head. Whether a particular service is a telecommunications or information service has never been determined by the identity of the end user, and carriers are not excused from paying lawful inter-carrier compensation charges based on the socio-economic background of that carrier's customers. Furthermore, there is simply no credible evidence that prepaid calling cards would suddenly become unavailable or unaffordable to any group if AT&T were required to abide by the same rules that govern all other telecommunications carriers. The prepaid calling card industry is extremely competitive, and there are certainly numerous other providers ready and able to serve the market to the extent AT&T is either unwilling or unable to do so.

Please include this letter in the record in the above-referenced proceeding. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Stephen L. Earnest". The signature is fluid and cursive, with the first name "Stephen" being more prominent than the last name "Earnest".

Stephen L. Earnest

SLE:kjw

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cc: Christopher Libertelli  
Matthew Brill  
Daniel Gonzalez  
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